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PNCBANK

May 1, 1998

Ms. Cynthia L. Johnson
Director, Cash Management Policy and Planning Division
Financial Management Service
U.S. Department of the Treasury
401 14th Street, SW-Room 420
Washington, D.C. 20227

Re: Notice of Proposed Rulemaking
RIN 1510-AA39
31 CFR Part 210
Federal Government Participation
in the Automated Clearing House

Dear Ms. Johnson:

PNC Bank Corp., for itself and its individual subsidiaries, ("PNC") submits this letter in response to the request by the Financial Management Service of the U.S. Department of the Treasury (the "Service") for comment on revisions to the Service's regulations on Federal Government Participation in the Automated Clearing House (the "Proposed Rule") 63 Federal Register 5425 (February 2, 1998). With assets of approximately $75 billion, PNC is one of the nation's largest bank holding companies, with subsidiary banks located in Pennsylvania, Delaware and Massachusetts. PNC also has a federal savings bank subsidiary in Pennsylvania.

PNC appreciates the opportunity to comment on the Proposed Rule and hopes that its comments will assist the Service in formulating its final rule. As a Participating Depository Financial Institution of the National Automated Clearing House Association ("NACHA"), PNC hopes that the Service will also give serious consideration to the comments of NACHA in its separate letter on the Proposed Rule.

PNC supports the goals of encouraging broader and more efficient use by the federal government (the "Government") of electronic payments generally and the ACH system in particular, and of promoting uniformity in the rules applicable to both private sector and Government participants in the system. The Government should have the same incentive to act efficiently and reasonably under the applicable rules as do banks, with the same consequences for failure to do so. We believe that the rules should also recognize that banks act as intermediaries

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in transactions between the Government and members of the public, performing services that are valuable to both parties. In this role, banks should not be asked to bear liability beyond that which they can reasonably avoid by acting prudently and in accordance with reasonable commercial practices.

We have the following comments on the Proposed Rule.

210.2 Definitions

Actual or constructive knowledge. We believe that the Service's proposed definition of "actual or constructive knowledge" may cause uncertainty over a bank's liability under Subpart B for reclamations of benefit payments made after the death or legal incapacity of the recipient or death of the beneficiary.

Under the proposed definition, a bank would have "actual knowledge" when it "received information, by whatever means, of the death or incapacity." It would have constructive knowledge if it "would have discovered the death or incapacity if it had followed commercially reasonable business practices."

With respect to both actual and constructive knowledge, we think that the definition should include the concept that the information should come from an official source such as a death certificate, short certificate or written communication from a decedent's personal representative, or a copy of a court order adjudicating a recipient's incapacity. Banks should not be responsible for acting on the basis of unconfirmed information, regardless of its source.

The proposed definition is also troubling in two other respects. First, in contrast to the current Rule, under the Proposed Rule, a bank may be deemed to have knowledge prior to the time when the information is, or should have been, brought to the attention of an employee who handles benefit payments. Banks must be permitted the opportunity to communicate the information to the responsible individual or department. Second, neither the proposed definition of actual or constructive knowledge nor the treatment of a bank's liability for reclamations retains the statement contained in current section 210.12(d) that a bank does not have a general duty to search death notices. The Service did not comment on why this statement was omitted. We believe that it is important for the Service to make it unmistakably clear that it does not expect banks to return to this practice.

Applicable ACH Rules. The Service has proposed to exclude from this definition the ACH Rule requiring that a credit entry be originated no more than two banking days before the settlement date of the entry. No reason for this exclusion was articulated in the Supplementary Information

accompanying the Proposed Rule. We believe that the reason may be a desire of the Service to spread payment volumes over a longer time in order to reduce stress on the system during peak processing periods. While we recognize that this leveling effect might, by itself, be desirable, we believe that there would be certain associated problems that would outweigh the potential benefits, including increased problems and potential liability for banks. For example, a DNE is ineffective to cause the automated return of a benefit payment that has already been received but is being held or warehoused pending settlement. The exclusion of the two-day rule makes this circumstance much more likely. As a result, more post-death or post-incapacity benefit payments will become the subject of reclamations, which could be avoided by their automated return.

Furthermore, earlier release of items into the system obligates the RDFI to store those items on its own data processing system. In addition to the increased responsibility of having to preserve the data for the longer period, data warehousing generally increases production and storage costs for the RDFI and degrades system performance.

PNC believes that a modest expansion of the window for initiating credits, to three or four days, would be acceptable for the purpose of balancing the volume. However, in our judgment, any longer extension would be counterproductive, for the reasons cited above.

We also think that permitting agencies to originate credits far in advance of settlement will result in more entries that are erroneous, incorrect, etc. Instead, the Government should be taking steps to reduce the numbers of such entries and give agencies incentive to clean up their files before origination takes place.

210.3 Governing Law

Uniform Treatment of NACHA Rule Changes. PNC believes that the best way to promote uniformity between private sector and Government practices is to begin with the premise that NACHA rule changes will apply to the Government. In those cases in which a compelling reason exists to create an exception, the Service should propose that exception for public comment. Such a process would help to minimize the extent to which banks must deal with two sets of rules.

We would also like to remind the Service that changes to NACHA rules are proposed for consideration and comment by the members. While the Government is not a NACHA member, it is our understanding that it has participated in the consideration of past NACHA rule changes. Through its continued participation in the review of future rule changes, the Government can be assured of the opportunity to coordinate the timing of its review with that of NACHA.

210.4 Authorizations and Revocation of Authorizations

Verification of Identity of Recipient. The Service has proposed to make a bank strictly liable for all payments made in reliance on an authorization that contains a forged signature or is otherwise fraudulent, without regard to the degree of care used by the bank in verifying the recipient's identity.

We believe that this standard would be unfair. Banks assist the Government and recipients by participating in the enrollment process. If a bank has acted in accordance with commercially reasonable practices, however, it should not be liable for all subsequent payments. No bank can be an insurer or guarantor against all fraud, regardless of the sophistication of its anti-fraud practices. A standard of strict liability creates a disincentive for banks to participate in the enrollment of benefit recipients. We believe that a standard such as "commercially reasonable practices" would be more appropriate.

Change in Account Ownership. The Proposed Rule appears to represent a modification of the type of change of ownership that would result in a termination of the authorization.

Current section 210.4(c)(2) states that the authorization will be terminated by a change in account ownership "which removes the name of the recipient, removes or adds the name of a beneficiary, or alters the interest of the beneficiary." Proposed section 210.4(c)(1) states that an authorization will be terminated by "a change in the ownership of a deposit account as reflected in the deposit account records, *including* the removal or addition of the name of a recipient, the addition of a power of attorney, or any action which alters the interest of the recipient." (emphasis added). The Proposed Rule appears to imply that any change in account ownership would result in termination, not only those changes that would adversely affect a recipient's interest in or access to the account. We request that the Service clarify the intention of this change and explain the rationale for termination upon any change in ownership, if that is the Service's intention.

210.5 Account Requirements for Benefit Payments. Section 210.4(a) of the current Rule requires that the account title "shall include the name of the recipient." Proposed section 210.5(a) requires that the "account shall be in the name of the recipient."

It is unclear whether the Service is proposing by this change to require that the account into which benefit payments are deposited be solely in the name of the recipient. Such a requirement would make it impossible for a recipient to use a joint account, for example, for the receipt of payments.

We request that the Service clarify that the account title need only include the name of the recipient.

210.6 Agencies. PNC believes that the use of a different limitation of liability for the Government than applies to other ACH participants will result in inequities that will have an adverse effect on the benefits of the ACH system. For example, if an agency initiated a duplicate debit entry to a Receiver's account, the Receiver' account might become overdrawn, resulting in returned checks and related charges for which the Receiver would attempt to recover compensation. If the Receiver's right of recovery from the Government were limited to the amount of the entry, the Receiver might seek compensation from the RDFI for a refund of charges and other damages resulting from the return of checks, loss of use of funds, etc. Even if the RDFI defended the claim successfully, it would have incurred expense in the process. This would shift the loss resulting from the agency's mistake unfairly from the Government to the RDFI.

The liability standards of the NACHA rules serve as an incentive to participants to follow the rules and to maintain and enforce appropriate practices and procedures for the use of the system. By allowing the Government to avoid responsibility for the consequences of its actions, we believe that the Proposed Rule would not give the Government the same incentive. We note that, in other contexts, the Government is liable to those with whom it does business for additional expenses, such as interest for late payments under the Prompt Payment Act (31 U.S.C. §3902). If the Government's liability must be limited under the Proposed Rule, such liability should include at least compensation for loss of use of funds.

The Proposed Rule would also use a comparative negligence analysis to reduce the Government's liability to an RDFI for losses resulting from the Government's origination of an erroneous or duplicate entry to the extent that the loss results from the RDFI's failure "to exercise due diligence *and* follow standard commercial practices." (emphasis added). It is unclear if these terms are intended to mean different things and, if so, how they would work together. Therefore, RDFIs would not know what they must do in order to avoid sharing in losses that result from processing the entries originated by the Government.

If there is to be a loss sharing concept, we propose that it be based upon failure to follow the relevant ACH Rules.

210.8 Financial Institutions

Prenotifications. PNC strongly objects to the proposed requirement that an RDFI verify at least one identifying element in addition to the account number in a prenotification from the

Government. Because there is no reliable way to distinguish between prenotifications initiated by the Government and other prenotifications, banks would have to apply the new standard to all prenotifications. This would require a labor intensive manual process that would be directly contrary to the manner in which the ACH system is supposed to work.

Liability. PNC Bank has expressed its opinion in this letter that the Government's liability should not be limited to the amount of the entry. If the Government's liability is so limited, we agree with the corresponding limitation on the liability of banks under section 210.8(c).

We recommend that the Service clarify that the prohibition against transmitting a debit entry to an agency without proper authorization is not intended to affect a bank's rights to transmit a reversal entry that is consistent with the NACHA Rules.

Subpart B-Reclamation of Benefit Payments

210.10 RDFI Liability

Full Liability. Proposed section 210.10(a) would continue the requirement that banks notify the Government immediately upon learning of the death or incapacity of a recipient or death of a beneficiary, if the information came from a source other than the agency. PNC recognizes that it may be in the bank's best interest to give the notification; however, a bank should not have additional liability beyond that which otherwise would apply for failure to do so.

Time Limits. Under the Proposed Rule, the most recent six years of payments would be used to determine the amount an agency could claim in a reclamation. We believe that it is more logical to use the six years immediately following the death or incapacity as the basis for determining the amount of a bank's liability. PNC does not object to an exception to that limit in circumstances in which the bank can recover any additional amount from the account without sustaining an additional loss.

We support the 120-day deadline within which agencies must initiate reclamations. However, we believe that the Government should be subject to the same standards as banks with respect to when it is deemed to have knowledge of the death or incapacity, and the obligation to certify that fact.

The Service has proposed to move to the Green Book the 60-day time period for an RDFI to return funds, because it "is a procedural item that may change with the automation of reclamations." We support the Service's intention to move items that are truly procedural to the

Green Book, provided that doing so would not permit the Service to effect adverse changes in a bank's rights or obligations without due process. We believe that any shortening of the 60 day period would be such an adverse change and that any such proposed change should be subject to the notice and comment requirements.

210.11 Limited Liability

Actual or constructive knowledge. We have stated above our objections to the definition of "actual or constructive knowledge" as it relates to a bank's liability under proposed section 210.11.

Amount in the account. The Service has proposed to eliminate from the definition of the amount in the recipient's account, which is used to determine the amount of a bank's liability in a reclamation, the concept that a bank should have a reasonable time to take action upon receipt of a notice of reclamation. Such a change would fail to recognize that even with automated systems a bank may not be able to change the status of an account instantaneously. Allowing a reasonable time to take action is consistent with the standard used in other laws and regulations for similar purposes, such as giving effect to a stop payment order on a check under the Uniform Commercial Code and on a preauthorized debit to a consumer's account under Regulation E of the Board of Governors of the Federal Reserve System. Banks should not be liable to the Government for withdrawals that occur before they have had an opportunity to act upon the information they receive.

Qualification for limited liability. We note that one of the criteria for limiting a bank's liability in proposed section 210.11(b)(1) is the time at which a bank had actual or constructive knowledge, while in section 210.11(b)(2) it is stated as the time at which a bank "first had information of the death or legal incapacity." We find this inconsistent language confusing; it is unclear whether the two standards are intended to mean different things, and we request clarification from the Service.

We are also concerned that the certification requirements would make the reclamation process more cumbersome by adding a layer of paperwork. We question why the Service finds it necessary to introduce these requirements. We have stated elsewhere in this letter our recommendation that if the requirements are made to apply, they should apply equally to the Government's obligation to initiate a reclamation within 120 days of when it has notice of the death or incapacity.

Forfeiture of rights. PNC believes strongly that the proposed change in section 210.11(d) is inappropriate and unfair. The Service has articulated no reason why a failure to comply with any

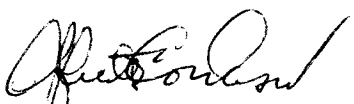
part of Subpart B, other than those that relate directly to the qualifications for limited liability stated in sections 210.11(a) and (b), should cause a bank to lose its right to limit its liability.

The Service has also asked for comment on another possible approach to liability for reclamations under which banks would be liable for the full amount of all entries received after death or incapacity, without regard to whether they had actual or constructive knowledge of the death or incapacity. This approach is not part of the Proposed Rule; however, the Service has suggested that banks might find that, on balance, the cost savings to be realized by doing away with the infrastructure needed to monitor compliance with those rules would exceed the dollar amount of any resultant additional liability.

PNC's experience has been that the limitation of liability provisions of Part 210 have resulted in a substantial reduction in losses that exceeds the related cost of administration. Furthermore, we would expect to perform much of the same research under the Service's suggested approach as we do today in order to pursue reimbursement from the surviving depositor(s) or the estate of the decedent. We are concerned that the Service's suggestion would result in substantially increased losses from reclamations without the possibility of a corresponding reduction in expenses. For this reason, we think it is unlikely that the approach suggested by the Service would be beneficial to us or to the industry generally. What would be more helpful would be to require all agencies to send DNEs as notification of death. Today, only a few agencies do so. We think that such a requirement would improve the efficiency of the process and result in reduced losses for both banks and the Government.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions, or would like more information about any of the points in this letter, please contact the undersigned.

Respectfully submitted,



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